For the reasons discussed more fully below, this Court's review is unwarranted.

I. THE INTERPRETATION OF THE PHRASE "BASED UPON" IS AN INCONSEQUENTIAL ISSUE THAT DOES NOT WARRANT THIS COURT'S ATTENTION

A. The Issue Is Relevant To Only a Narrow Category of *Qui Tam* Cases, and This Court Has Declined to Consider the Issue at Least Six Times.

Petitioners' suggestion that the proper interpretation of the term statutory term "based upon" merits this Court's attention vastly overstates its importance. Although two circuits have adopted a minority position on this issue (Pet. 9-11), the circuit split is of little practical consequence in the vast majority of *qui tam* complaints brought under the FCA.[3] In fact, the issue is relevant only if: (1) the Government does not intervene; and (2) the relator is not an "original source"

[3] The decision below did not deepen or extend the existing split of authority. At least nine circuit courts—the Sixth Circuit among them—had already interpreted the phrase "based upon" broadly to require only that the allegations in a *qui tam* complaint be similar to or supported by a prior public disclosure. *See, e.g., United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 324 (2d Cir. 1992); *United States ex rel. Mistick PBT v. Housing Auth. of City of Pittsburgh*, 186 F.3d 376, 394-402 (3d Cir. 1999); *Fed. Recovery Servs.*, 72 F.3d at 451; *United States ex rel. Jones v. Horizon Healthcare Corp.*, 160 F.3d 326, 332 (6th Cir. 1998); *Minn. Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1044-47 (8th Cir. 2002); *United States ex rel. Biddle v. Bd. of Trs. of Stanford Univ.*, 161 F.3d 533, 538 (9th Cir. 1998); *United States ex rel. Fine v. Advanced Sciences, Inc.*, 99 F.3d 1000, 1006 (10th Cir. 1996); *Cooper v. Blue Cross & Blue Shield of Fla., Inc.*, 19 F.3d 562, 567 (11th Cir. 1994); *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 688 (D.C. Cir. 1997). Only two circuits have required that a *qui tam* complaint be "derived from" a prior public disclosure to trigger the jurisdictional bar. *See, e.g., United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1347-49 (4th Cir. 1994); *United States v. Bank of Farmington*, 166 F.3d 853, 863 (7th Cir. 1999).

of the information underlying the suit. If the Government elects to intervene and take over the litigation, the public disclosure bar does not divest the court of jurisdiction. *See, e.g., United States ex rel. Merena v. SmithKline Beecham Corp.*, 205 F.3d 97, 103 (3d Cir. 2000). Furthermore, if the relator is an "original source," the public disclosure bar does not apply. *See, e.g., United States ex rel. Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168, 175 (5th Cir. 2004). In short, Petitioners' claim that the decision below "threatens the continued viability of" the FCA is greatly exaggerated. (Pet. 8).

This Court repeatedly has recognized the unimportance of the issue. It has declined at least six opportunities to consider the issue. *See, e.g.*, Petition for Writ of Certiorari, *United States ex rel. King v. Hillcrest Health Ctr., Inc.*, No. 01-956, at 6-11 (U.S. Dec. 28, 2001), *cert. denied*, 535 U.S. 905 (2002); Petition for Writ of Certiorari, *United States ex rel. Mistick PBT v. Housing Auth. of City of Pittsburgh*, No. 99-969, at 16-23 (U.S. Dec. 8, 1999), *cert. denied*, 529 U.S. 1019 (2000); Petition for Writ of Certiorari, *United States ex rel. Biddle v. Bd of Trs. for Stanford Univ.*, No. 98-1268, at 9-17 (U.S. Jan. 28, 1999), *cert. denied*, 526 U.S. 1066 (1999); Petition for Writ of Certiorari, *United States ex rel. McKenzie v. BellSouth Telecomms., Inc.*, No. 97-850, at 11-16 (U.S. Nov. 21, 1997), *cert. denied*, 522 U.S. 1077 (1998); Petition for Writ of Certiorari, *United States ex rel. Findley v. FPC-Boron Employees' Club*, No. 97-157, at 6-10 (U.S. June 16, 1997, *cert. denied*, 522 U.S. 865 (1997); Petition for Writ of Certiorari, *United States ex rel. Siller v. Becton Dickinson & Co.*, No. 94-106, at 12-15 (U.S. July 15, 1994), *cert. denied*, 513 U.S. 928 (1994).

Petitioners nevertheless claim that the issue now urgently demands this Court's attention, insisting that absent this Court's review, the holding below "will . . . discourage private citizens with knowledge of . . . fraud [against the Government] from blowing the whistle." (Pet. 25) That argument misapprehends the operation of the public

disclosure bar, regardless of the interpretation of the "based upon" language. No private citizen with *direct and independent* knowledge of fraud will be "discouraged" from bringing a *qui tam* lawsuit by a broad interpretation of the "based upon" language, because such an individual can satisfy the "original source" *exception* to the bar in any event. *See* 31 U.S.C. § 3730(e)(4)(B) (defining original source as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information").

Importantly, the public disclosure bar in no way affects the Government's right to pursue claims under the False Claims Act. It applies only in cases in which the Government *declines* to intervene. Nor does the issue presented by the Petition have any bearing on the substantive obligations of government contractors. The proper interpretation of "based upon" affects only the ability of relators who are *not* "original sources" to bring *qui tam* actions where there has been a prior public disclosure.

In short, this case does not warrant this Court's attention.

B. The Sixth Circuit, Like the Clear Majority of Circuits, Correctly Interpreted the Statutory Language.

The Sixth Circuit's application of longstanding circuit precedent interpreting the statutory term "based upon" agrees with the clear majority of circuits to have considered the issue. Eight other circuits agree with the Sixth Circuit. *John Doe Corp.*, 960 F.2d at 324 (2d Cir.); *Mistick PBT*, 186 F.3d at 394-402 (3d Cir.); *Fed. Recovery Servs.*, 72 F.3d at 451 (5th Cir.); *Minn. Ass'n of Nurse Anesthetists*, 276 F.3d at 1044-47 (8th Cir.); *Biddle*, 161 F.3d at 538 (9th Cir.); *Fine*, 99 F.3d at 1006 (10th Cir.); *Cooper*, 19 F.3d at 567 (11th Cir.); *Findley*, 105 F.3d at 688 (D.C. Cir.). The Sixth Circuit's interpretation of "based upon," in keeping with the

majority view, is faithful to both the statutory language and to the purpose of the public disclosure bar.

The public disclosure bar reflects Congress's judgment that there is no need to induce private citizens to "blow the whistle" where information regarding fraud has already been publicly disclosed. *See, e.g., United States ex rel. McKenzie v. BellSouth Telecomms., Inc.*, 123 F.3d 935, 943 (6th Cir. 1997); *Findley*, 105 F.3d at 690. The purposes underlying the public disclosure bar are appropriately served by a rule that interprets the term "based upon" to encompass prior disclosures that are substantially similar to the allegations in a subsequent *qui tam* action; in those cases, the Government is adequately placed on notice of the possible existence of fraud by the public disclosure, and a later *qui tam* suit raising "similar" allegations is simply unnecessary.

In this case, the Sixth Circuit correctly discerned that a prior public disclosure sufficient to put the Government on notice of the "possibility of fraud" triggered the public disclosure bar. (App. 10a). This case represents nothing more than a fact-dependent application of the settled majority interpretation of the statutory language. The outcome was perfectly in keeping with the intent of the public disclosure bar.

The minority rule followed by two circuits, in contrast, would render superfluous the "original source" exception to the public disclosure bar. *See* 31 U.S.C. § 3730(e)(4)(A) & (B). According to the minority rule, a *qui tam* lawsuit is barred by the public disclosure bar only when the allegations made in that suit are directly "derived from" a prior public disclosure—meaning that the relator obtained the precise information on which his suit is based directly from the earlier disclosure. *See Bank of Farmington*, 166 F.3d at 863; *Siller*, 21 F.3d at 1348. In such a case, the relator *could never* be an original source with "direct and independent knowledge" (31 U.S.C. § 3730(e)(4)(B)) because, by

hypothesis, his lawsuit used information derived from some previously publicly disclosed source.

The minority rule, which interprets "based upon" to mean "derived from," would render meaningless the "original source" exception, which requires relators to have "direct and independent knowledge." 31 U.S.C. § 3730(e)(4)(B). *See Findley*, 105 F.3d at 683. Petitioners' proposed interpretation of "based upon" thus contradicts the rule of statutory interpretation that a statute should be read so that none of its provisions are rendered meaningless. *See, e.g., Hibbs v. Winn*, 542 U.S. 88, 101 (2004); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992).

Because the Sixth Circuit, like the clear majority of circuits, has correctly interpreted the phrase "based upon" in keeping with the purposes of the public disclosure bar, this Court's review is unnecessary.

II. THE SUPPOSED "CONFUSION" AMONG THE CIRCUITS REGARDING THE PHRASE "ALLEGATIONS OR TRANSACTIONS," IF THERE IS "CONFUSION" AT ALL, IS NOT AN ISSUE WORTHY OF THIS COURT'S ATTENTION

Petitioners also urge the Court to consider the interpretation of the "allegations or transactions" language in the public disclosure bar, contending that the circuit courts have not uniformly interpreted the language to require a particular quantum or nature of prior disclosure in order to trigger the jurisdictional bar. Petitioners vastly overstate the supposed "confusion." Rather, the existing case law merely reflects the highly fact-specific inquiry required to determine whether allegations in a *qui tam* action are substantially similar to information and allegations contained in prior public disclosures.

As Petitioners implicitly acknowledge by their careful use of the term "confusion," there is no true circuit split in the lower courts regarding the kind or amount of prior public disclosure necessary to trigger the bar. Petitioners merely

point out that appellate courts, including the Sixth Circuit[4], sometimes have described the quantum of prior disclosure needed to trigger the bar by analogy to a mathematical formula, *see, e.g.*, *Springfield Terminal Ry.*, 14 F.3d 645, and sometimes have described the kinds and amounts of information that constitute a prior public disclosure without using that analogy. *See, e.g.*, *United States ex rel. Found. Aiding Elderly v. Horizon W.*, 265 F.3d 1011 (9th Cir. 2001). But Petitioners fail to recognize that the "prior public disclosure" inquiry is, by its very nature, highly fact-dependent. Whether allegations in a *qui tam* complaint are similar enough to publicly disclosed allegations to trigger the jurisdictional bar depends on a multitude of case-specific factors. There is no circuit "confusion," but only a number of cases each decided on its own particular facts.

Hoping to sow "confusion" where none exists, Petitioners unfairly characterize the Sixth Circuit's opinion, suggesting that the Sixth Circuit found "*general* allegations of fraud . . . previously asserted against Medtronic" (Pet. 17 (emphasis in original)) sufficient to trigger the jurisdictional bar. This conclusion, Petitioners suggest, is "at odds" with the decisions of other circuits, which have supposedly required something more. *See* Pet. 19 (citing, *inter alia*, *United States ex rel. Found. Aiding Elderly v. Horizon W.*, 265 F.3d 1011 (9th Cir. 2001)). In fact, the Sixth Circuit found that *specific* prior public disclosures contained information about the same alleged fraudulent acts

[4] To the extent that the Petition suggests that the Sixth Circuit applied a "rule" for measuring the kind or amount of prior disclosure sufficient to trigger the jurisdictional bar that conflicts with the "rules" applied in other circuits, Petitioners do not fully describe the opinion below. In fact, the Sixth Circuit applied the same mathematical formulation Petitioners urge (Pet. 16-17), as originally developed by the D.C. Circuit in *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994). *See* App. 19a (citing the Sixth Circuit's decision in *United States ex rel. Jones v. Horizon Healthcare Corp.*, 160 F.3d 326, 331 (6th Cir. 1998)).

Petitioners alleged in their *qui tam* complaint. In particular, the Sixth Circuit found that prior disclosures contained information about both the true state of facts and the false state of facts as supposedly represented by Medtronic, as well as specific disclosures of the alleged fraud itself. *See* App. 9a.

As noted, the Sixth Circuit relied on the complaint in a prior products liability action, *North v. Medtronic, Inc.*, No. 97-2-16954-2SEA (Wash. Super. Ct. July 7, 1997) (6th Cir. J.A. 946-984) to find a prior public disclosure. Petitioners contend that the *North* complaint discloses different allegations from those in Petitioners' *qui tam* complaint, not allegations that "'specifically identify the nature of the fraud.'" Pet. 19 (quoting *Findley*, 105 F.3d at 687). Petitioners overlook the fact that the *North* complaint was only one of a number of prior public disclosures that Medtronic cited; in fact, Medtronic presented documents from 17 prior civil actions and three administrative reports, all of which disclosed the allegations of fraud on the FDA at the heart of Petitioners' *qui tam* complaint. *See* App. 9a. The Sixth Circuit noted the existence of numerous public disclosures but found the bar triggered by the first of them, the *North* complaint, without the need to rely on the others. *Id.*

What Petitioners complain about is not that the courts have adopted conflicting standards to determine what constitutes a prior public disclosure, but that the *application* of the standard to widely varying facts has led to differing outcomes—and, in particular, to the dismissal of their complaint. *See* Pet. 22. The Petition asks this Court not to determine the proper *rule* for measuring whether a prior disclosure satisfies the public disclosure bar, but to correct what they believe is an improper *application* of the public disclosure bar to the facts of this case. Because there is no "conflict" and no "confusion," and because of its fact-bound nature, this issue does not warrant the Court's attention.

III. THIS CASE IS A POOR VEHICLE TO CONSIDER THE PETITIONERS' QUESTIONS BECAUSE IT RAISES AN ISSUE OF FIRST IMPRESSION THAT CALLS INTO QUESTION THIS COURT'S JURISDICTION

Even if the Court were inclined to review the questions raised in the Petition, this case does not present an appropriate vehicle for doing so. The case comes burdened with an unresolved jurisdictional question that would require this Court to decide a close question of first impression (and one not presented in this Petition): whether a *qui tam* relator in a suit in which the Government has declined to intervene is bound by the 14-day time limit for private parties to file petitions for rehearing or the 45-day time limit applicable to the Government. *See* Fed. R. App. P. 40(a).

There is substantial reason to question whether this Court has jurisdiction to entertain the Petition if Petitioners' petition for rehearing was in fact untimely under Fed. R. App. 40. Supreme Court Rule 13 requires that a petition for a writ of certiorari be filed within 90 days of the judgment of the court of appeals. Under Supreme Court Rule 13.3, the 90-day time limit runs from the date the court of appeals denies a rehearing petition but only "if a petition for rehearing *is timely filed* in the lower court." (Emphasis added.) Therefore, if Petitioners' petition for rehearing before the Sixth Circuit was not timely filed—a difficult question that the courts of appeals have yet to address—Rule 13 and 28 U.S.C. § 2101(c) provide that this Court lacks jurisdiction over the Petition. This Court's jurisdiction turns on whether Petitioners made a "timely" petition for rehearing before the Sixth Circuit.

Federal Rule of Appellate Procedure 40(a) establishes the time within which a petition for panel rehearing must be filed (and Fed. R. App. P. 35(c) incorporates the same deadlines as applicable to a petition for rehearing *en banc*). It creates a dual deadline: A petition for hearing must

ordinarily "be filed within 14 days after entry of judgment," *except* "in a civil case, if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment, unless an order shortens or extends the time." Fed. R. App. P. 40(a)(1). The Rule does not expressly address the deadline for *qui tam* relators in cases in which the Government does not intervene.

Petitioners, as relators bringing an action under the FCA's *qui tam* provisions, sought rehearing well after the expiration of the 14-day time period but within 45 days. Their petition was untimely, however, because the United States *declined to intervene* in Petitioners' *qui tam* suit. The United States was therefore not a "party" to the action under Fed. R. App. P. 40(a).

Whether a relator in a case in which the Government declines to intervene has 14 or 45 days to file a petition for rehearing appears to be a question of first impression. This Court would be required to confront that question—without the benefit of any development of the issue in the lower courts—to ensure itself that Petitioners' request for rehearing (and, it follows, their Petition) was timely.[5]

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[5] The difficulty of this issue is demonstrated by judicial disagreement over on the deadline applicable to the filing of a notice of appeal in a *qui tam* case in which the Government has not intervened. Like Rule 40, Federal Rule of Appellate Procedure 4 sets up a dual deadline that depends upon whether the United States is a "party." The Rule requires that a notice of appeal be filed within 30 days after the entry of judgment, unless the United States or its officer or agency is a party, in which case the deadline is 60 days. *See* Fed. R. App. P. 4(a)(1)(A)-(B). Two circuits apply the 30-day deadline in *qui tam* cases in which the Government has not intervened. *See United States ex rel. Petrofsky v. Van Cott, Bagley, Cornwall, McCarthy*, 588 F.2d 1327, 1329 (10th Cir. 1978); *United States ex rel. McAllan v. City of New York*, 248 F.3d 48, 51 (2d Cir. 2001). By contrast, three circuits apply the 60-day deadline. *United States ex rel. Lu v. Ou*, 368 F.3d 773, 775 (7th Cir. 2004); *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304,

The better rule is that the shorter time period under Fed. R. App. 40(a) applies to relators. To begin with, as this Court explained in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 773-74 & n.4 (2000), a relator is an *assignee* of claims that belong to the United States. A relator does not "become" the United States in a *qui tam* suit. As an assignee of claims belonging to the United States, a relator is subject to the 14-day time limit under Rule 40(a), not the longer time limit reserved to the United States. Moreover, as a practical matter, the Government is given a longer period of time to file because many layers of approval within the Government are required at the appellate stage of litigation. By contrast, relators need only to confer with themselves. Under that logic, Petitioners were untimely in filing their petition for rehearing before the Sixth Circuit, presumably making this Petition for a writ of certiorari untimely as well.

If this Court concludes that Petitioners did not timely file the rehearing petition before the Sixth Circuit, then this Court would lack jurisdiction over the Petition, because a party must file a petition for a writ of certiorari within 90 days of the appellate court's judgment (not mandate). *See* Sup. Ct. R. 13 & 13.3; *United States v. Swan*, 230 F.3d 1040 (7th Cir. 2000) (absent a timely and appropriate petition for rehearing, the 90-day time limit to file a petition for a writ of certiorari runs from entry of the judgment of the Court of Appeals). The 90-day time limit for seeking review in this Court is jurisdictional. "Title 28 U.S.C. § 2101(c) requires that a petition for certiorari in a civil case be filed within 90 days of the entry of the judgment below. This 90-day limit is mandatory and jurisdictional." *Missouri v. Jenkins*, 495 U.S. 33, 45(1990).

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308 (5th Cir. 1999); *United States ex rel. Haycock v. Hughes Aircraft Co.*, 98 F.3d 1100, 1102 (9th Cir. 1996).

As noted, a "timely" petition for rehearing before the Court of Appeals can extend the time for filing a petition for a writ of certiorari. *See* Sup. Ct. R. 13.3; *see also, e.g.*, Robert L. Stern, *et al.*, *Supreme Court Practice*, at 355 (8th ed. 2002) ("The consistent practice of the Court has been to treat petitions for rehearing *that are timely and properly presented to the federal or state court below* as tolling the start of the period in which a petition for certiorari must be sought . . . .") (emphasis added). *Cf. Browder v. Director, Dep't of Corrs.*, 434 U.S. 257, 267 (1978) (Supreme Court lacked jurisdiction because Petitioner had failed to make a timely petition for rehearing before the district court). Petitioners were not, however, timely in their request for rehearing in the Sixth Circuit. Moreover, Petitioners did not seek leave to file an untimely request for rehearing, nor did the Sixth Circuit grant them leave.[6] Thus, Petitioners were required to file their Petition in this Court within 90 days of the Sixth Circuit's April 6, 2005 judgment, which they failed to do. They did not file their Petition in this Court until October 31, 2005, which was 118 days late.

Even if the Court were inclined to address the questions the Petition poses, it should await a more appropriate vehicle for doing so—one not burdened with jurisdictional problems.

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[6] Medtronic did not have an opportunity to raise the untimeliness of Petitioners' petition for rehearing before the Sixth Circuit, because the Sixth Circuit did not request a submission in response to the petition. *See* Fed. R. App. P. 40(a)(3) ("Unless the court requests, no answer to a petition for panel rehearing is permitted."). The Sixth Circuit denied the petition for rehearing in a brief order that did not consider whether the request was timely. App. 1a-2a. This case is, therefore, unlike *Hibbs v. Winn*, 542 U.S. 88, 98 (2004), in which the Court of Appeals on its own motion asked the parties to brief whether the case should be reconsidered *en banc*, and also unlike *Young v. Harper*, 520 U.S. 143, 147 n.1 (1997), in which the Court of Appeals expressly granted leave to file the rehearing petition two days beyond the time allowed by Fed. R. App. 40(a).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 05-578

In the Supreme Court of the United States

LOUIS F. GILLIGAN AND GREGORY M. UTTER,
Petitioners,

v.

MEDTRONIC, INC.;
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY FOR PETITIONERS

Respondent Medtronic's opposition ("Opp.") leaves unchallenged most of the core legal arguments that Petitioners made in support of granting certiorari in this case. Instead, Medtronic attempts to distract this Court with tangential arguments from different cases and with an unavailing jurisdictional argument that, if anything, further supports the granting of the Petition.

It remains true that this Court is presented with an acknowledged circuit split and circuit confusion in a significant legal area. Moreover, this Court has yet to address any aspect of the troublesome Public Disclosure Bar despite the explicit notations by courts of appeals of the significant legal questions in this area. *See United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734, 740 (3d Cir. 1997) (noting the "host of interpretive issues"); *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 681 (D.C. Cir. 1997) (noting "extensive litigation" and "circuit splits").

1. Medtronic acknowledges that there is a circuit split on the question of the meaning of the phrase "based upon" as used in the Public Disclosure Bar. Medtronic also does not deny that the resolution of that question is outcome determinative in this case, as it would be in many others. Instead, Medtronic attempts to downplay the importance of the circuit split and claims that, in fact, the Sixth Circuit's decision was substantively correct. Neither argument is persuasive.

a. Medtronic questions the "importance" of the circuit split by citing the prior instances where this Court has declined to address the issue. (Opp. 7). Contrary to Medtronic's suggestion, however, one cannot ascertain exactly why this Court has previously declined to review this issue. But what can be gleaned is this: it is apparent that this

circuit split is not going to resolve itself without this Court's intervention. The conflict has now percolated, with at least two circuits on each side, for nearly six years. It makes no sense for this Court to continue to delay resolution of this split. In fact, if anything, the number of times that this issue has been petitioned shows that it remains a significant, dispositive, and recurring issue that calls for resolution by this Court.

Medtronic attempts to minimize the impact of the interpretation of "based upon" by suggesting that it has no impact on incentives to file *qui tam* suits. That claim defies common sense. Medtronic does not deny that the outcome in this case would have been different had the case arisen in the Fourth or Seventh Circuits. It is, in fact, apparent that the differences in the circuits in how "based upon" is interpreted has a direct and tangible impact on whether a case can proceed, thereby making it more difficult for a private party to pursue such a suit. Thus, any potential *qui tam* relator in the Sixth Circuit must weigh the possibility that some public disclosure of a substantially similar fraud, somewhere, could stop his lawsuit, a calculation that a similarly-situated relator in a different circuit does not have to make. That obviously creates a disincentive for some *qui tam* relators to file meritorious lawsuits.

b. Medtronic also suggests that the Sixth Circuit's reading of "based upon" is the correct construction. Medtronic, however, offers no challenge to Petitioners' plain language analysis, *i.e.* that "based upon" cannot mean merely "supported by" or "similar to." Instead, Medtronic asserts that the purposes of the Public Disclosure Bar are served by the Sixth Circuit's formulation. In fact, it is Petitioners' plain language construction that serves both the purpose of the Public Disclosure Bar, preventing parasitic lawsuits, and

Congress' desire to encourage meritorious *qui tam* lawsuits, as expressed in conjunction with the 1986 Amendments.

Congress has already decided, through legislation, that false claims lawsuits can be pursued even where the government decides not to pursue the claims. Such suits have produced millions of dollars in recoveries for the government. By interpreting "based upon" broadly, however, the Sixth Circuit and others have made a policy decision to bar *qui tam* lawsuits that is not supported by Congress' own choice of language. In fact, the plain language construction of "based upon" precisely prevents parasitic lawsuits rather than indiscriminately barring *qui tam* suits, as Medtronic's formulation would do.

Medtronic also asserts that the plain language construction of "based upon" renders the "original source" provision superfluous. That contention, however, is incorrect. According to Medtronic, there could never be a situation where a relator derived his allegations from public disclosures and had "direct and independent" knowledge of the allegations. But one could easily envision a situation in which a relator, aware of some suspect practice by a company, informs the government of the practice and then later derives the information for a lawsuit directly from public disclosures, perhaps a government investigatory affidavit. That relator would still have direct and independent knowledge of the allegations.

In fact, there is no requirement under the original source provision that the relator have knowledge of all of the information relevant to the claim. *See, e.g., United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 657 (D.C.Cir. 1994); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co.*, 944 F.2d 1149, 1160 (3d Cir. 1991) ("Undoubtedly, it is not necessary for a relator to have all the relevant information in order to qualify as

'independent.'"). Thus, a relator who has derived part of his information directly from a public disclosure can still bring his case as an original source if he meets the direct and independent criteria with respect to a different element of his claim.

There are certainly plausible ways to read "based upon" that give meaning to the "original source" provision and also preserve a plain language construction of "based upon." Medtronic's construction, by contrast, simply ignores the plain language and depends for support upon a contrived issue of statutory interpretation that does not exist.

2. Medtronic brushes off Petitioners' second proffered reason for granting the writ, claiming that the inquiry into what constitutes "allegations or transactions" for purposes of the jurisdictional bar is, "by its very nature, highly fact-dependent." (Opp. 11). While the outcomes may be fact-dependent, the legal tests employed to reach those outcomes should be uniform. There is, however, anything but uniformity among the circuits. The Sixth Circuit's decision exacerbated the problem because it employed novel legal tests for determining the existence of "allegations" and "transactions" – tests that will significantly weaken the deterrent and enforcement effects of the FCA in the Sixth Circuit.

a. The Sixth Circuit acknowledged that the prior publicly disclosed "allegations" of fraud against Medtronic were of a "slightly different type" than Petitioners' allegations in their FCA case, but held that such a difference is immaterial so long as the prior publicly disclosed allegation is "sufficiently general" that it "could encompass the fraud alleged in the *qui tam* action." Pet. App. 11a.[1] That legal test is in direct

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[1] Medtronic misrepresents the Sixth Circuit's opinion when it argues that the Sixth Circuit found "specific disclosures of the alleged fraud itself."

conflict with the tests employed by the Ninth Circuit, which requires a showing that the prior publicly disclosed allegation "'fairly characterize[]' the kind of fraud alleged" in the *qui tam* complaint, *United States ex rel. Foundation Aiding the Elderly v. Horizon West Inc.*, 265 F.3d 1001, 1015-16 (9th Cir. 2001), and the D.C. Circuit, which requires a showing that the prior publicly disclosed allegations "specifically identify the nature of the fraud" alleged in the subsequent *qui tam* suit. *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 687 (D.C. Cir. 1997).

The Sixth Circuit's holding was not, as Medtronic suggests, fact-dependent. Had the Sixth Circuit employed the Ninth or D.C. Circuit tests, it would have reached a different conclusion because, while there were publicly disclosed general allegations of state law fraud surrounding the manufacture of Medtronic's pacemaker leads, it is undisputed that there were no allegations of the "kind of fraud" alleged in Petitioners' lawsuit – *i.e.*, that Medtronic changed its platinum sputter design post-FDA-approval and therefore sold unapproved leads to Medicare.

b. The Sixth Circuit held that there is a prior public disclosure of a fraudulent "transaction" when the public was told the "false state of facts," and when the "true state of facts" could be inferred by linking together various pieces of publicly disclosed information. That test is inconsistent with tests used by the Eighth and D.C. Circuits, which require disclosure of the actual "true state of facts." *United States ex rel. Rabushka v. Crane Co.*, 40 F.3d 1509, 1512-14 (8th Cir.

(Opp. 12, citing Pet. App. 9a). The part of the Sixth Circuit decision to which Medtronic cites is the Sixth Circuit's discussion of whether there was prior public disclosure of fraudulent "transactions" not "allegations." Medtronic, in fact, ignores the Sixth Circuit's entire "allegations" analysis, instead focusing its discussion on the "transactions" analysis.

1994) (true state of facts was not "in the public domain"); *United States ex rel. Springfield Terminal Railway Co. v. Quinn*, 14 F.3d 645, 654 (D.C. Cir. 1994) (true state of facts must "surface publicly"). Again, the Sixth Circuit's choice of test was dispositive. Had the Sixth Circuit followed the Eighth or D.C. Circuits, it could not have found prior public disclosure of the "true state of facts" because, until Petitioners' discovery, no one else knew that Medtronic had changed its platinum sputter design post-FDA-approval.

The Sixth Circuit did not point to one allegation or "piece of information" that "surface[d]" that true fact. Instead, the Sixth Circuit relied on separate pieces of information from various sections of the *North* complaint, which, the court held, could be linked together to somehow concoct an inference that Medtronic secretly altered its product's platinum sputter specification after the FDA had approved the lead.[2] Although Petitioners find fault with the Sixth Circuit's conclusion – *i.e.*, that such an inference was reasonable – the more fundamental problem is the Sixth Circuit's unprecedented decision, after-the-fact and with the benefit of

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[2] In its opposition, Medtronic states that, in addition to the *North* case, which is the only case the Sixth Circuit discussed, it had also "presented documents from 17 prior civil actions and three administrative reports, all of which disclosed the allegations of fraud on the FDA at the heart of Petitioners' *qui tam* complaint." (Opp. 12). While these various documents arguably disclosed allegations that Medtronic defrauded the FDA by misrepresenting information about the leads' safety and about the efficacy and results of product testing, none of those documents disclosed the allegations of fraud "at the heart of" Petitioners' *qui tam* case – *i.e.*, that Medtronic changed its platinum sputter specifications after FDA approval and defrauded Medicare by selling a product different from the one that had been FDA-approved. That, of course, is because Petitioners were the first to discover that fraud.

perfect hindsight, to substitute a mere inference for the requirement of publicly disclosed facts.

The Government needs the FCA because it cannot police the public on its own. Barring a relator from bringing a *qui tam* case in situations where the Government could or should have inferred a fraud by extrapolating from a few publicly available facts, places an unrealistic investigative burden on the Government and deprives the Government of its most important "litigative tool for the recovery of losses sustained as the result of fraud." *Avco Corp. v. Dept. of Justice*, 884 F.2d 621, 622 (D.C. Cir. 1989).

3. Medtronic suggests that this Court lacks jurisdiction over this case because Petitioners' Sixth Circuit *en banc* request was untimely. That argument is incorrect and should not hinder this Court's decision to grant this case. But even if the Court thought that this issue were significant, it presents yet another reason why the Court should grant the Petition.

a. The question is whether a *qui tam* relator has 45 days under Fed. R. App. P. 35(c) and 40(a)(1) to file for panel and *en banc* rehearing because the United States is a "party" to the case. Under the language of the FCA, even where it has not intervened, the United States must be regarded as a party to a *qui tam* lawsuit. For example, the relator must file his lawsuit "for the person and for the United States government" and "in the name of the government." 31 U.S.C. §3730(b)(1). In addition, the United States can insist on receiving copies of all pleadings and depositions, §3730(c)(3), and can pursue alternative remedies, §3730(c)(5). But the United States is more than just a party in name only. The United States gets the vast bulk of any sum that the lawsuit produces, even absent formal intervention, and the relator is left with his "bounty." *See* 31 U.S.C. §3730(d)(2).

For these reasons, as Medtronic concedes, the majority of federal courts that have addressed the issue have determined

that a *qui tam* relator has sixty days to file a notice of appeal under Fed. R. App. 4(a) rather than 30 days because the United States is a "party" even absent intervention. (Opp. 14 n.5). As the Fifth Circuit recognized in that context, reading the Rule in the way that Medtronic suggests would pose a "trap[] for the unwary," given the language of the FCA itself. *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304, 308 (5th Cir. 1999). The Fifth Circuit also noted that Fed. R. App. P. 4 ought to be "construed to reduce uncertainty in the already difficult conceptual terrain of qui tam suits."[3] That logic is equally applicable in the context of Fed. R. App. P. 40(a) and 35(c).

b. But even if this Court thought that the timing issue is one that required resolution, this Court can resolve the issue by granting this Petition. This is a straightforward legal question that this Court could easily address in the context of this case. And while it appears to be one of first impression with respect to the rehearing issue specifically, the Court has the benefit of the court of appeals caselaw addressing the analogous Rule 4 issue.

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[3] The first court of appeals to address the issue was the 10th Circuit, which applied the 30 day rule in a *per curiam* opinion over dissent. *United States ex rel. Petrofsky v. Van Cott, Bagley, Cornwall, McCarthy*, 588 F.2d 1327 (10th Cir. 1979). Since that opinion, the three other courts of appeals that have explicitly addressed the issue have all determined that the United States is a party for purposes of Fed. R. App. P. 4(a). *See United States ex rel. Haycock v. Hughes Aircraft Co.*, 98 F.3d 1100 (9th Cir. 1996); *Russell, supra*; *United States ex rel. Lu v. Ou*, 368 F.3d 773 (7th Cir. 2004). In the latter, Judge Posner described the 10th Circuit's opinion as, in part, "very curious." *Id.* at 775. This Court's decision in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 773-74 n.4 (2000), plainly did not address this issue and, in fact, contrary to Medtronic's suggestion, said that a relator is only a "partial" assignee of a government damages claim, not an assignee of the entire claim. (*see* Opp. 15).